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MAY 24 2004

No. 03-1442

IN THE

Supreme Court of the United States

EAGLE INSURANCE COMPANY and
NEWARK INSURANCE COMPANY,

Petitioners,

v.

BANKVEST CAPITAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

I. The Assertion That There Is No Conflict in the Circuits Is Plainly Wrong

Not surprisingly, BankVest Capital Corp. ("BankVest") tries to construct an argument that the First Circuit was wrong when it announced its direct disagreement with the Ninth Circuit, saying in the plainest language possible: "We disagree with the Ninth Circuit. . . ." Petition for Certiorari ("Petition") App. at 2a.[1] It rests its argument on the notion that the First Circuit's opinion was, in some fashion, either limited to its facts or created by its unique facts.

The principal problem for BankVest is that there is absolutely no support for its supposition. Neither the First Circuit nor the Ninth Circuit limited the application of their analyses in any way. *See In re Claremont Acquisition Corp.*, 113 F.3d 1029 (9th Cir. 1997). Both Circuits' exegesis of 11 U.S.C. § 365(b)(2)(D) are based on fundamental principles of statutory interpretation and neither case attempts to limit its holding. Any attempt to limit them to their facts would be dismissed by the district and bankruptcy courts in their respective jurisdictions. Indeed, as noted in the Petition, bankruptcy courts in other jurisdictions have advanced both the Bankruptcy Court's and the Bankruptcy Appellate Panel's decision in this case as opinions of general authority. *See, e.g., In re Williams*, 299 B.R. 684 (Bankr. S.D. Ga. 2003) (citing the *BankVest* Bankruptcy Appellate Panel decision), *In re Walden Ridge Development, LLC*, 292 B.R. 58 (Bankr. D.N.J. 2003) (citing the *BankVest* Bankruptcy Court decision).

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1. Indeed, BankVest does not even mention the First Circuit's explicit statement of disagreement until footnote 15 in the next section of its Opposition.

Further undermining BankVest's attack is the lack of any logical connection between its dissection of the facts and the resulting decisions. It is, of course, true that each case arose in different circumstances – commonplace in cases that reach this Court. Nonetheless, BankVest does not explain (perhaps because it cannot do so) ***how*** the differences in facts lead to the two different conclusions. The core question is whether the debtor was required to cure non-monetary defaults before assuming the executory contract; the availability of potential remedies does not change that point of decision. Indeed, as discussed in the next section, the state court litigation to which BankVest gives pivotal effect does not, will not, and cannot address the issue before the bankruptcy court.

Any fair reading of *Claremont* and the decision below cannot come to any conclusion other than this: the circuits are in direct and irreconcilable conflict.

II. Additional Case Law Is Not Desirable and Is Likely to be Problematic

There are indeed occasions in which this Court has deferred resolution of disputes to allow the case law to develop. This is not one of those occasions. First, this is not a situation in which an entire statute is being construed and further development of its potential structures is necessary to determine if a conflict is real or not. Here there is a discrete provision of the Bankruptcy Code which is at issue.

Second, as discussed in the Petition, there is no assurance that other circuits will line up on one side or the other, eventually persuading the minority to revisit the issue.

In criticizing the possibilities set out in the Petition, BankVest misses the point. It is not that those other positions have been definitively adopted that is important, it is that they exist, would be possible interpretations, and are likely to gather some support. This will leave the circuits hopelessly fragmented.

BankVest has no response. In its discussion, BankVest never explains what such development might be or how it might help this Court. Its argument is built on bold assertion rather than reasoned explanation. In order to disguise its inability to make a cogent point, BankVest quotes from an opinion by Justice Stevens concerning a certiorari petition that specifically makes clear that all such commentary on substantive law in opinions respecting petitions for certiorari are dicta and have no precedential value – including that very opinion. The language that BankVest fails to draw to this Court's attention makes that clear:

> One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all.
>
> Another attribute of these opinions is that they are potentially misleading. Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any

> reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference.

Singleton v. Commissioner, 439 U.S. 940, 944-945 (1978) (Justice Stevens, Opinion Regarding the Denial of a Petition for Writ of Certiorari). There is something wrong with citing as authority to this Court for a proposition of substantive law a decision whose author explicitly cautioned against so doing.

As pointed out in the Petition, this issue has been addressed not only by at least two courts of appeals, but by several other lower courts. Put simply, there is no further development that will assist this Court or the lower courts.

III. This Case Is Not Moot

At several points in its brief, BankVest seemingly asserts that this case is moot. It first makes that point when it states that "Petitioners do not actually state that the decisions below are wrong. . . ." Brief in Opposition at 20-21. In making this assertion, BankVest apparently neglects the admonition of Sup. Ct. Rule 10 which makes clear that arguments about the correctness *vel non* of the decision below are not the focus of a proper petition. To avoid, however, any ambiguity, it is petitioners' position that the decisions below were wrong.[2]

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2. While it is understandable that BankVest feels it necessary to grant such little credence to the position of Eagle and Newark before this Court, their argument is disingenuous. As noted by

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Another theory of mootness is that the state court proceeding will resolve all issues. This is simply incorrect. What the state court action will decide is which party owes which other party money. It will not decide – because it cannot – the issues of cure and assumption. A motion and stipulation filed with and approved by the Bankruptcy Court makes this clear. Attached as Appendix A and Appendix B hereto, respectively are Motion to Approve Stipulation Modifying the Plan Injunction, and Stipulation Modifying Plan Injunction. As stated in therein, the Stipulation was entered into in order to allow Eagle and Newark to assert what arguably are compulsory counterclaims in litigation instituted in state court by BankVest. The Stipulation and Motion recognize that the Cure Claims are outstanding and that the state court litigation will determine the *amount* of the claims that each party has against the other. The priority of those claims, which is at the very heart of the proceedings before this Court, will be determined by the Bankruptcy Court after a decision by this Court.

IV. BankVest's Attack on the Motives of Petitioners Is Wrong and Irrelevant

As it has throughout this litigation, BankVest spends an inordinate amount of time attacking the motives of petitioners rather than addressing the merits of the disputes. Several points should be made about this ad hominem attack. First,

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the First Circuit, the issue now before this Court was raised by the Bankruptcy Court, not BankVest. It is clearly an issue that was not so clear to BankVest at the time the Bankruptcy Court asked the parties to submit their briefs on the issue of whether the claims asserted by Eagle and Newark, if proved, rose to the level of cure claims.

petitioners disagree in the strongest terms. A detailed chronology is not appropriate for this filing, but it should be made clear that at all times and in every court, petitioners and their counsel have made good faith filings solely to vindicate their legal rights. While BankVest may be inconvenienced by the Petition, it is the right of every litigant to bring to this Court's attention matters that are potentially worthy of review.

Second, although BankVest has brought its tired plaints to every court, it has been rebuffed in every court. Not a single court has found that any of the Petitioners' filings were in other than good faith and based on reasoned arguments of law.

Finally, these personal attacks are irrelevant. If this matter is worthy of consideration by this Court, the character of the person or company bringing the matter to its attention is unimportant. In sum, BankVest's innuendo is both irrelevant and not worthy of this Court's attention.

V. BankVest's Attempt to Minimize the Importance of This Issue Fails

At the core of BankVest's assertion that this issue is not important is its claim that a prior decision of this Court, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188 (1984), renders the matter academic. Brief in Opposition at 22. Plucking one sentence out of the *Bildisco* opinion, BankVest asserts that the case mandates that a debtor assuming an executory contract must perform all of its obligations under the contract, including all non-monetary obligations. Such a reading would render the First Circuit's decision directly contrary to this Court's precedent.

Thus, either the First Circuit and the Ninth Circuit engaged in pointless analysis because this Court has already decided the matter, or, perhaps more likely, *Bildisco* does not stand for the proposition asserted by BankVest. Once that prop has been knocked from its argument, BankVest's glaring failure to cite to any other case for that proposition only underlines the weakness of its critique.

The facts remain as set forth in the Petition: this is an important issue and a great deal turns on its resolution.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A – MOTION TO APPROVE STIPULATION MODIFYING PLAN INJUNCTION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Chapter 11
Case No. 99-47760-JBR

In re

BANKVEST CAPITAL CORPORATION,

Debtor

MOTION TO APPROVE STIPULATION MODIFYING THE PLAN INJUNCTION

TO THE HONORABLE JOEL B. ROSENTHAL, BANKRUPTCY JUDGE:

AND NOW, come Eagle Insurance Company ("Eagle"), Newark Insurance Company ("Newark"), Material Damage Adjustment Corp. ("MDAC"), Ark CLO 2000-1, Limited ("Ark") and BankVest Capital Corporation (the "Debtor"), by Stephen Gray in his capacity as the Liquidating Supervisor appointed under the Fifth Amended Joint Liquidating Plan of Reorganization, As Modified (the "Plan") and move this Court for approval of a stipulation modifying the plan injunction to permit Eagle, Newark and MDAC to assert counterclaims against the Debtor in actions pending in the Massachusetts Superior Court. In support of this motion, the parties state as follows:

Appendix A

1. On May 31, 2001, this Court entered an Order Approving Supplemental Disclosure Statement And Confirming Fifth Amended Joint Liquidating Plan Of Reorganization, As Modified, Of Debtor And Creditors' Committee (the "Confirmation Order").

2. Pursuant to the Confirmation Order and the Plan, there is in place an injunction (the "Plan Injunction") to the same extent and with the same effect as the stay imposed by Section 362 of the Bankruptcy Code and such injunction remains in effect until this case is closed pursuant to Section 350 of the Bankruptcy Code.

3. On October 24, 2003, the Debtor filed the following two actions against Eagle and Newark in the Massachusetts superior court: *BankVest Capital Corp. v. Eagle Insurance Company, et al.*, Suffolk Superior Court, Civil Action No. 03-4936-C and *BankVest Capital Corp. v. Newark Insurance Company, et al.*, Suffolk Superior Court, Civil Action No. 03-4937-E (collectively, the "State Court Actions"). In its Complaints, the Debtor seeks to recover from Eagle and Newark for, among other things, payments allegedly due under equipment leases (the "Leases") entered into between the Debtor and Eagle and Newark prior the date of the petition initiating this case.

4. Eagle, Newark and MDAC intend to file counterclaims against the Debtor in the State Court Actions arising primarily out of the Debtor's failure to deliver a portion of the equipment that was the subject of the Leases.

5. As this Court is well aware, Eagle's and Newark's claims arising out of the Debtor's failure to deliver the equipment are also the subject of requests for cure costs (the "Cure Claims") and proofs of claim (the "Claims") filed by Eagle and Newark in this Court. The Cure Claims are the subject of an appeal currently pending before the First Circuit. As to the Claims, a hearing is presently scheduled for April 8, 2004.

6. Eagle, Newark and MDAC seek relief from the Plan Injunction in order to litigate their counterclaims against the Debtor in the State Court Actions on the grounds that they risk waiving such claims if they are not asserted in the State Court Actions.

7. The parties have stipulated to the following terms of relief from the Plan Injunction: (i) the state court final judgments on the claims of Eagle, Newark, or MDAC against the Debtor, if any (after all appeals or the expiration of all appeals periods) shall be dispositive of the issues and claims actually determined and shall determine the dollar amount of such claims, if any, against the estate; (ii) notwithstanding anything to the contrary, the Bankruptcy Court shall retain exclusive jurisdiction to determine the priority of such claims, if any, against the estate; and (iii) proceedings on the claims of Eagle and Newark against the estate, which are now set for hearing on for April 8, 2004, shall be continued generally pending determination of claims asserted in the State Court Actions.

8. The parties have entered into a stipulation (the "Stipulation") memorializing the terms described herein,

which is submitted herewith as Exhibit A. By this motion, the parties seek the Court's approval of the Stipulation.

WHEREFORE, it is respectfully requested that the Court enter an Order approving the Stipulation, continuing generally the hearing on the Debtor's objection to the Claims, and granting such other and further relief as may be appropriate.

EAGLE INSURANCE COMPANY, NEWARK INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.
By their attorneys,

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Appendix A

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Dated: February 23, 2004

APPENDIX B – STIPULATION MODIFYING PLAN INJUNCTION

UNITED STATES BANKRUPTCY COURT DISTRICT OF MASSACHUSETTS

Chapter 11
Case No. 99-47760-JBR

In re

BANKVEST CAPITAL CORPORATION,

Debtor

STIPULATION MODIFYING PLAN INJUNCTION

This stipulation (the "Stipulation") is made and entered into as of this 24th day of February, 2004 by and among, Eagle Insurance Company ("Eagle"), Newark Insurance Company ("Newark"), Material Damage Adjustment Corp. ("MDAC"), Ark CLO 2000-1, Limited ("Ark") and BankVest Capital Corp. (the "Debtor"), by Stephen Gray in his capacity as the Liquidating Supervisor appointed under the Fifth Amended Joint Liquidating Plan of Reorganization, As Modified (the "Plan"). For purposes of this Stipulation, Eagle, Newark, MDAC, Ark and the Debtor shall be referred to, collectively, as the "Parties," and individually as a "Party."

Recitals

WHEREAS, on May 31, 2001, the Bankruptcy Court entered the Order Approving Supplemental Disclosure Statement And Confirming Fifth Amended Joint Liquidating

Appendix B

Plan Of Reorganization, As Modified, Of Debtor And Creditors' Committee (the "Confirmation Order");

WHEREAS, pursuant to the Confirmation Order and the Plan, there is in place an injunction (the "Plan Injunction") to the same extent and with the same effect as the stay imposed by Section 362 of the Bankruptcy Code and such injunction remains in effect until this case is closed pursuant to Section 350 of the Bankruptcy Code;

WHEREAS, on October 24, 2003, the Debtor filed the following two actions against Eagle, Newark and MDAC in the Massachusetts superior court: *BankVest Capital Corp. v. Eagle Insurance Company, et al.*, Suffolk Superior Court, Civil Action No. 03-4936-C and *BankVest Capital Corp. v. Newark Insurance Company, et al.*, Suffolk Superior Court, Civil Action No. 03-4937-E (collectively, the "State Court Actions");

WHEREAS, the State Court Actions assert various claims against Eagle, Newark and MDAC relating to or arising out of the equipment leases ("Leases") entered into between the Debtor and Eagle and the Debtor and Newark;[1]

WHEREAS, Eagle, Newark and MDAC desire to assert counterclaims against the Debtor in the State Court Actions; and

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1. Ark is responsible for adjudicating such claims in accordance with the Order approving assumption of executory contracts with Eagle and Newark.

Appendix B

WHEREAS, Eagle and Newark have filed claims against the Debtor with this Court;

NOW THEREFORE, in consideration of the mutual covenants and promises set forth herein, the Parties agree and stipulate as follows:

1. The Plan Injunction shall be modified to permit Eagle, Newark and MDAC to assert any and all claims, counterclaims or defenses that they may have against the Debtor in the State Court Actions.

2. The state court final judgments on the claims of Eagle, Newark, or MDAC against the Debtor, if any (after all appeals or the expiration of all appeals periods) shall be dispositive of the issues and claims actually determined and shall determine the dollar amount of such claims, if any against the estate.

3. Notwithstanding anything to the contrary, the Bankruptcy Court shall retain exclusive jurisdiction to determine the priority of such claims, if any, against the estate.

4. Proceedings on the claims of Eagle and Newark against the estate, which are now set for hearing on for April 8, 2004, shall be continued generally pending determination of claims asserted in the State Court Actions.

IN WITNESS WHEREOF, the signatories below, being fully authorized and empowered to bind the Parties to this Stipulation, have authorized and executed this Stipulation.

Appendix B

EAGLE INSURANCE COMPANY, NEWARK INSURANCE COMPANY and MATERIAL DAMAGE ADJUSTMENT CORP.
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